

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

GTE CORPORATION,

Transferor,

and

BELL ATLANTIC CORPORATION

Transferee

CC Docket No. 98-184

**OPPOSITION TO PETITION FOR RECONSIDERATION OF  
SPRINT COMMUNICATIONS COMPANY L.P.**

More than one month ago, the Bureau sustained the objection of GTE and Bell Atlantic ("Applicants") to allowing Mr. Leon Kestenbaum and Mr. Craig Dingwall of Sprint to have access to Applicants' confidential documents. Sprint has petitioned for reconsideration of that decision. Applicants request that the Bureau deny the petition for reconsideration for the following reasons:

**First,** the Bureau's prior decisions made clear that Sprint had the burden of filing affidavits justifying their request for access to confidential documents. Sprint cannot blame the Bureau for Sprint's own decision not to follow these simple directions.

**Second,** and more fundamentally, the new evidence submitted by Sprint does not in any justify reconsideration of the Bureau's decision.

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***Third***, Sprint will not be prejudiced by the Bureau's decision, as Sprint has already designated another in-house attorney who already has access to confidential documents and can perform the same functions in connection with this case as Mr. Kestenbaum and Mr. Dingwall.

### **ARGUMENT**

***The Petition Should Be Denied Because the "New Facts" In Sprint's Petition Were Known To Sprint At The Time Of The Original Ruling.*** Under Section 1.106 of the Commission's rules, upon which Sprint relies for reconsideration, a petition that relies on new evidence may be granted only if the facts either (i) relate to new matters that have arisen since the last opportunity to present such facts; or (ii) were unknown to the petitioner at the time of the last opportunity to present such facts. 47 C.F.R. §§ 106(c), 106(c)(1); 106(b)(2).<sup>1</sup> The petition therefore must be denied because: (i) the petition clearly "relies on facts not previously presented" – the affidavits of Kestenbaum and Dingwall; and (ii) the facts (which relate entirely to the job responsibilities of Kestenbaum and Dingwall) neither relate to "new matters" nor were unknown to Sprint when this issue was first decided.

Sprint has only itself to blame for failing to present this evidence earlier. When it filed its response to Applicants' objection, Sprint was on notice that the Bureau in a similar case had rejected "cursory affidavit[s]" denying a role in competitive decisionmaking and had held that "the mere assertion that [an attorney] do[es] not participate [in competitive decisionmaking], without any type of substantiation, is insufficient." *In the Matter of Application of WorldCom and MCI for Transfer of Control*, Order Ruling On Joint Objections, 13 FCC Rcd 13478 ¶ 2 (1998).

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<sup>1</sup> The only exception to this rule is when the Bureau finds that the public interest requires consideration of the evidence. 47 C.F.R. § 1.106(c)(2). Sprint presents no argument why the public interest requires overlooking its own inexcusable failure to present evidence earlier.

Faced with this precedent, Sprint chose to rely on a “mere assertion” that Kestenbaum and Dingwall do not participate in competitive decisionmaking. Sprint made this assertion “without any type of substantiation” – not even a single “ cursory affidavit” of the kind the Bureau has rejected before. The Bureau should deny the petition for that reason alone.

***The New Evidence And Authority Presented By Sprint Do Not Alter The Propriety Of The Bureau’s Decision.*** Even if the Bureau were inclined to consider the affidavits and legal authorities presented by Sprint, the Bureau should not change its decision. As the Bureau noted, in Sprint’s response to Applicants’ objections, Sprint conceded that Kestenbaum and Dingwall’s advice is “used to inform business decisions.” Order at ¶ 2. Sprint now argues that the statement at issue “was part of a longer sentence, and indeed a larger discussion” about denying regulatory attorneys access to documents, Petition at 9 n. 23.

But this much is clear – in that “larger discussion,” Sprint did not contest the fact that it uses the advice of Kestenbaum and Dingwall “to inform business strategies or decisions.” Instead, Sprint argued merely that the fact that a company uses an attorney’s advice to inform business decisions should not bar the attorney from access to confidential documents. The close relation between regulation and business in the telecommunications industry presumably is why the Commission has adopted a rule that lawyers at a sufficiently high position in a telecommunications company should not be granted access to confidential documents absent being walled off from competitive decisionmaking. Sprint’s position is, quite simply, inconsistent with the Bureau’s precedent. The Bureau was fully entitled to disagree with Sprint’s legal position, and to take Sprint’s silence for what it was – a concession of the facts.<sup>2</sup>

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<sup>2</sup> In addition, it is worth noting that the affidavits presented by Sprint to not rebut the allegation that these attorneys may be involved in competitive decisionmaking. Other than the conclusory assertion (continued...)

***Sprint Will Not Suffer Prejudice From The Bureau's Decision.*** After the Bureau denied access to confidential documents for Kestenbaum and Dingwall, Sprint requested access to confidential documents for a lower-level attorney, directly reporting to Kestenbaum. Applicants did not object to allowing access to confidential documents for this attorney, who presumably is in a similar position to Mr. Friedman of AT&T. Sprint therefore has able in-house counsel to review Applicants' confidential documents.

### **CONCLUSION**

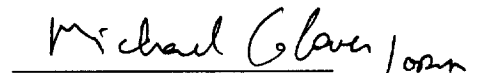
The petition for reconsideration should be denied.

Respectfully submitted,

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<sup>2</sup> (...continued)

that the individuals are not involved in competitive decisionmaking within the meaning of the protective order, the affidavits contain only the denial that the individuals have neither "offered" nor been "asked to" participate in "setting rates, targeting particular markets, developing new products or product lines, or any similar business decisions." Kestenbaum Aff. ¶ 4; Dingwall Aff. ¶ 4. The affidavits say nothing about whether these individuals have actually have participated in such decisions – just whether they have offered or been asked to participate. Moreover, the affidavits say nothing about whether the individuals have advised other Sprint personnel to make these decisions, or anything about the many other kinds of competitive decisions not addressed in the affidavits. Such cleverly-worded affidavits should not be sufficient to overcome the Bureau's original decision.

## **CERTIFICATE OF SERVICE**

This is to certify that I have served a copy of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION OF SPRINT COMMUNICATIONS COMPANY L.P. on the following by hand delivery on April 5, 1999.

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